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ZNR UUUUU ZZH
R 111736Z AUG 09
FM AMEMBASSY SAN JOSE
TO RUEHC/SECSTATE WASHDC 1109
INFO RUEHZA/WHA CENTRAL AMERICAN COLLECTIVE
RUEAWJA/DEPT OF JUSTICE WASHINGTON DC

UNCLAS SAN JOSE 000682

SIPDIS
SENSITIVE

DEPT FOR WHA/CEN, CA

E.O. 12958: N/A
TAGS: [CASC](#) [PREL](#) [PGOV](#) [KOCI](#) [CR](#)

SUBJECT: COSTA RICAN COURT'S DENIAL OF EXTRADITION RAISES CONCERNS
ABOUT BILATERAL RELATIONS

11. (SBU) SUMMARY: On June 26, a Costa Rican court denied a USG extradition request for Nicole Kater, an American citizen wanted in California on charges of parental child abduction. The court's lengthy and convoluted decision revolved around Costa Rica's need to ensure Kater's fundamental human rights and protect her from alleged domestic violence. The decision concerns Post for many reasons: 1) the decision appears to contravene the bilateral extradition treaty; 2) the decision questions both the USG's commitment to human rights and the USG's ability to protect its citizens against human rights violations in cases of domestic violence; and 3) the decision may be yet another indication that Costa Rica has or will soon become a safe-haven for child abducting parents. Post seeks Department guidance on formulating a comprehensive response to the Government of Costa Rica ("GOCR") to address the USG's concerns about the court's decision and its ancillary effects. END SUMMARY.

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FACTUAL BACKGROUND
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12. (SBU) On November 22, 2000 Nicole Kater ("Kater") and John Gehl ("Gehl"), who were never married, gave birth to Tierra Zion Gehl-Kater ("Tierra") while visiting Costa Rica. After an extended stay, they returned to the United States and settled in California. The relationship soured and a custody battle ensued. On August 8, 2005 the Superior Court of Humboldt County California issued an order to show cause that required Kater to appear at a hearing on August 29 and forbade her from removing Tierra from Humboldt County. On August 17, in violation of the Court's order, Kater fled to Costa Rica with Tierra. On August 22, after fleeing, Kater filed a response to the order to show cause motion in which she alleged that Gehl had abused both her and Tierra throughout their relationship. Kater had never previously alleged being a victim of domestic violence nor were there any court or police records substantiating that any domestic violence had ever occurred.

13. (SBU) On June 16, 2006 a Federal arrest warrant was issued against Kater on charges of international parental kidnapping. For more than two years Kater's and Tierra's whereabouts were unknown, and Gehl was deprived of all of his parental rights. On April 22, 2008 Kater was arrested in Costa Rica. In its extradition request, the U.S. government ("USG") provided assurances to GOCR that if extradited, Kater would not be subject to the death penalty or life imprisonment and that she would only be tried in the United States for the offense for which extradition was requested. As per the extradition treaty, the USG was represented by the Office of the Procuraduria General of the GOCR. In opposition to the extradition request was Kater and her attorney and a cadre of governmental entities, including the Attorney General, the Public Defender's Office, the National Women's Institute (Spanish acronym INAMU), and the Ombudsman's Office.

14. (SBU) Soon after her arrest and the start of extradition proceedings, Kater and her "team" of supporters went into high gear

to forestall her impending return to the U.S. Kater filed an asylum petition alleging that she feared Gehl and had been abused by him.

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A PROLONGED COURT BATTLE ENSUED
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15. (SBU) On September 18, 2008 the first court to hear the USG's extradition request agreed with the Attorney General's position and denied extradition on the ground that there was a lack of dual criminality, which is required under the bilateral extradition treaty. The decision was appealed by the Procuraduria. On November 7 an appeals court ruled that the Attorney General's Office should be excluded from the proceedings. On December 16, the same appeals court found that there was dual criminality, reversed the September 18 decision and granted extradition. On January 23, 2009 the Constitutional Court annulled the appeals court's decision, ordered that another court hear the extradition case and also ordered that the Attorney General's Office had the right to participate in the proceedings.

16. (SBU) On March 10 the Attorney General himself appeared before a court in San Ramon to oppose the USG extradition. While his principle argument was the lack of dual criminality, he also made statements that he was concerned that if Kater were returned to the United States that Costa Rican could not assure that her human rights would be protected. Kater's attorney and the other entities opposing extradition once again based their arguments on Kater's unsubstantiated domestic violence allegations and the need to protect her from further abuse. In a well-written decision that granted extradition the court explained that there clearly was dual criminality. It also stated that any allegations of domestic violence should be addressed by the competent court in the United

States rather than the Costa Rican court hearing the extradition request. Of course, all parties opposing extradition appealed.

17. (SBU) On June 26 at the final extradition hearing, the Court of Appeals for the Third Judicial Circuit of San Ramon denied the USG's extradition request and ordered that Kater be released immediately. In its lengthy and convoluted written decision issued on July 24, the judges explained that they based their ruling on the Ombudsman's argument that extradition would violate Kater's human rights. The court found that Kater and Tierra were both victims of domestic violence perpetrated by Gehl and that granting extradition would severely harm their fundamental rights and Costa Rica's obligation to protect said rights. The judges further wrote that aside from the bilateral extradition treaty, a Costa Rican court reviewing an extradition request must also consider the Costa Rican constitution as well as international human rights conventions, both of which supersede the extradition treaty. The court went on to say that in light of Costa Rica's obligation to protect a woman's and a child's fundamental human rights, the issue of dual criminality was irrelevant, and therefore never decided by the court.

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WHY POST IS CONCERNED
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18. (SBU) Post is concerned that Costa Rica's decision to deny the USG's request to extradite Kater potentially nullifies the bilateral extradition treaty (entered into between Costa Rican and the United States on October 11, 1991). Using the rationale for denying extradition in this case any Costa Rican courts could choose to ignore Costa Rica's bilateral extradition treaty obligations and deny an extradition if that court determines that an individual's human rights protections are at issue. In the future anyone facing extradition from Costa Rica, especially an abducting parent, could successfully argue that his/her extradition should be denied based on the grounds that the individual has been or could be a victim of domestic violence if they were returned to the United States. The Kater decision ignores the fact that a competent court in the requesting country (in this case the United States) is the proper venue to address legal issues not directly related to the extradition request or underlying crime.

19. (SBU) Post is also concerned that the Kater decision demonstrates that the GOCR questions the USG's commitment to human

rights as well as the USG's ability to protect its citizens against domestic violence. Using the court's rationale and the arguments made by the governmental entities opposing Kater's extradition, it is implied that the GOCR does not believe that an individual in the United States will receive adequate (human rights) protection in cases where there are allegations of domestic violence. Post fears that GOCR's stance that the USG is incapable of protecting individuals' fundamental human rights may adversely affect future bilateral relations.

¶10. (SBU) Finally, Post is concerned that the Kater decision (along with Costa Rica's Minister of Public Security's decision last year to grant refugee status to another abducting parent, who claimed she was also a victim of domestic violence) could be dangerous precedents leading to Costa Rica becoming a safe haven for child abductors who disagree with the outcome of their custody disputes in U.S. courts. It now appears to be sufficient for an extraditee in an international parental child abduction case to merely claim that s/he has been the victim of domestic violence for a Costa Rican court to deny an extradition request and base its decision on human rights and/or domestic violence concerns. Rather than determine whether the extradition requirements have been met under the bilateral extradition treaty, Costa Rican courts may now base their decisions to grant or deny extradition on legal defenses that have traditionally been heard by courts in the requesting country (after extradition has been granted). As a result, an abducting parent hiding in Costa Rica has a new tool to avoid prosecution in their country of habitual residence.

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POST SEEKS DEPARTMENT GUIDANCE ON ENGAGING GOCR
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¶10. (SBU) Post believes that the USG must actively engage the GOCR about the implications of this decision on Costa Rica's international treaty obligations and bilateral judicial cooperation with the United States. Post is currently preparing a Diplomatic Note ("DipNote") to the GOCR Foreign Ministry ("MFA") regarding this case, as it has implications for Costa Rica's international treaty commitments, which are the responsibility of the MFA. Post will share its DipNote draft with WHA and L prior to submission to the MFA. Post also suggests that these issues be raised with the Costa Rican Embassy in Washington, whenever possible. From conversations

with colleagues at the MFA and from other diplomatic missions in Costa Rica Post senses that they too are concerned about these court decisions and their implications for Costa Rica's international treaty obligations. Post would appreciate any other advice/guidance that the Department could provide with regard to this case.

BRENNAN